No. 16005

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

OREN E. CUMMINS, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on December 13, 1957 by the United States District Court for the Southern District of California (Tolin, J.) granting judgment to the appellee for $760 as retirement benefits due to him under the provisions of 5 U.S.C. 691(d). The district court's jurisdiction was based on 28 U.S.C. 1346(a)(2). The United States filed notice of appeal on February 6, 1958 (R. 30), time for docketing the record on appeal was extended by order of the district court to May 7, 1958 and the case was docketed in this Court on that date (R. 31, 142). This Court's jurisdiction rests upon 28 U.S.C. 1291.

STATEMENT OF FACTS

Appellee, Oren E. Cummins, was employed by the Internal Revenue Service as an Internal Revenue Agent from March 26, 1928 to November 30, 1954, when he reached the mandatory retirement age of 70 years (R. 44). As an Internal Revenue Agent, appellee had since October 1928, been assigned to the "Fraud Group," with the duty of making joint investigations, with Special Agents of the Internal Revenue Service Intelligence Unit, of suspected violations of the criminal provisions of the Internal Revenue Code (R. 20, 44, 47-53).

Appellee on October 18, 1954, made application for retirement under former Section 1(d) of the Civil Service Retirement Act, 5 U.S.C. 691(d) (1952 ed.), *infra,* pp. 4-5, which provided particularly liberal benefits for persons eligible for retirement under that Section. The requirements for such eligibility, as set forth in the statute, are met by an officer or employee who (1) has performed certain hazardous duties as there defined for a period of at least twenty years; (2) is at least fifty years old; and (3) whose application for retirement under Section 1(d) has received the recommendation of the head of his department or agency, and the approval of the Civil Service Commission. The statute does not set any criteria for the granting or withholding of the recommendation of the head of the agency or department involved, but provides that upon such recommendation, the Civil Service Commission shall determine whether the officer or employee is entitled to retirement under Section 1(d). The Civil Service Commission, in making such determination, is required to give full consideration to the degree of hazard to which the officer or employee is

subjected in the performance of his duties, rather than the general duties of the class of his position.

The Secretary of the Treasury refused to recommend appellee for retirement under Section 1(d) (R. 138-141), and in the absence of such recommendation, the Civil Service Commission advised appellee that there was no authority for his retirement under that Section (R. 136-137). His retirement benefits were therefore computed under the general retirement provisions of Section 4(a) of the Act.

Appellee then brought this action in the court below (R. 3-6, 9-12), seeking in his amended complaint to recover the $76 per month difference between the amount to which he would have been entitled if he had been retired under Section 1(d) of the Retirement Act, and the amount he had actually received since his retirement on November 30, 1954 under Section 4(a) of the Act (R. 11-12). He also prayed for a judgment declaring that he was entitled to be retired under Section 1(d) (R. 12). The district court, after a hearing, held that it had no jurisdiction to award declaratory relief in this case, but awarded a money judgment to appellee in the sum of $760, representing $76 per month for the ten months from December 1, 1954 to and including September 1955, the date of the filing of the complaint.

The court found (R. 20, 21-22, 27) that appellee met the requirements for retirement under Section 1(d) with respect to age, length of service, and type of work, and specifically, that appellee "in the performance of his duties was subjected to a degree of hazard contemplated by Section 1(d)" (R. 27). The court found, however, that the Secretary of the Treasury, in refusing to recommend appellee for Section 1(d) retirement,

had not considered the type of duties performed by appellee individually nor the degree of hazard to which he was individually subjected in the performance of these duties (R. 25-26). Instead, the court held, the Secretary had negotiated with the Civil Service Commission a list of positions which would be eligible for retirement under Section 1(d), and the Secretary had withheld his recommendation for appellee's retirement under this Section on the ground that, at the time of his retirement, appellee was not classified in one of these negotiated positions (R. 22-26).

On the basis of these and related findings, the court held (R. 27-28) that at the time of his application for retirement, appellee "had satisfied all of the requirements for retirement under Section 691(d) of Title 5, USCA and is entitled to have his annuity computed under said Section." The court stated (R. 28) that Congress had intended each application for retirement to be considered on its merits without regard to the particular title of the position held, and concluded (R. 28) that the "failure of the Secretary of the Treasury and the Civil Service Commission to grant [appellee's] retirement under Section 691(d) was due to an erroneous interpretation of said Section in that the refusal of such retirement was based upon a classification of positions which had been set up contrary to the provisions of said Section."

STATUTES INVOLVED

Former Section 1(d) of the Civil Service Retirement Act of 1930, as amended, 5 U.S.C. 691(d) (1952 ed.) provided as follows at the time of appellee's retirement:

> Any officer or employee * * * the duties of

whose position are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States (including any officer or employee engaged in such activity who has been transferred to a supervisory or administrative position) who is at least fifty years of age, and who has rendered twenty years of service or more in the performance of such duties (including the duties of a supervisory or administrative officer or employee) may, on his own application and upon the recommendation of the head of the department or agency in which he is serving, and with the approval of the Civil Service Commission, retire from the service; and the annuity of such officer or employee shall be equal to 2 per centum of his average basic salary for any five consecutive years of allowable service at the option of such officer or employee, multiplied by the number of years of service, not exceeding thirty years. The Civil Service Commission shall, upon recommendation by the head of the department or agency involved, determine whether such officer or employee is entitled to retirement under this subsection. In making such determination, the Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such officer or employee.

Present Section 6(c) of the Civil Service Retirement Act of 1930, as amended, and as renumbered by the Civil Service Retirement Act Amendments of 1956, 70 Stat.

744, 5 U.S.C. 2256(c) (1952 ed., Supplement V), which replaced former Section 1(d) and became effective on October 1, 1956, provides in pertinent part as follows:

> Any employee the duties of whose position are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States, including any employee engaged in such activity who has been transferred to a supervisory or administrative position, who attains the age of fifty years and completes twenty years of service in the performance of such duties may, if the head of his department or agency recommends his retirement and the Commission approves, voluntarily retire from the service and be paid an annuity computed as provided in [Section 9 of the Act]. The head of the department or agency and the Commission shall give full consideration to the degree of hazard to which such employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such employee. * * *

SPECIFICATION OF ERRORS

1. The district court erred in granting a money judgment for appellee for monies allegedly due him under the provisions of 5 U.S.C. 691(d).

2. The district court erred in holding that appellee at the time of his retirement had satisfied all of the requirements for retirement under 5 U.S.C. 691(d).

3. The district court erred in holding that appellee is entitled to have his annuity computed under 5 U.S.C. 691(d).

4. The district court erred in holding that the refusal of the Secretary of the Treasury and the Civil Service Commission to grant appellee's retirement under 5 U.S.C. 691(d) was due to an erroneous interpretation of that Section.

5. The district court erred in holding that in the performance of his duties appellee was subjected to a degree of hazard as great or greater than the degree of hazard to which the Special Agent with whom he conducted investigations was subjected.

6. The district court erred in holding that appellee was subjected to a degree of hazard contemplated by 5 U.S.C. 691(d).

7. The district court erred in failing to dismiss the action for lack of jurisdiction.

8. The district court erred in holding that the Secretary improperly refused to recommend appellee for retirement under this Section.

9. The district court erred in holding that the Civil Service Commission improperly denied appellee retirement benefits under 5 U.S.C. 691(d).

10. The district court erred in holding that the Secretary of the Treasury and the Civil Service Commission negotiated a list of positions covered by this Section because of an erroneous interpretation of the Statute.

ARGUMENT

The District Court Should Have Dismissed Appellee's Suit for Failure to State a Claim Upon Which Relief Could Be Granted

A. *Appellee's Failure to Obtain the Recommendation of the Secretary of the Treasury Precludes His Claim for Retirement Benefits Under Section 1(d) of the Retirement Act.*

1. *The retirement benefits of Section 1(d) are to be allowed only in the discretion of the head of the employee's agency.* Former Section 1(d) of the Civil Service Retirement Act, 5 U.S.C. 691(d) (1952 ed.) (*supra,* pp. 4-5), under which appellee sought to retire, expressly vests in the head of the employing agency complete discretion to determine whether an employee will be considered for retirement under that Section. The statute provides that a Government employee whose duties are primarily investigatory and who is at least fifty years old and has rendered at least twenty years of service in the performance of such duties "may, on his own application and upon the recommendation of the head of the department or agency in which he is serving, and with the approval of the Civil Service Commission, retire from the service * * *." The statute spells out the method of computing the annuity payable to such an employee, and then provides:

> The Civil Service Commission shall, upon recommendation by the head of the department or agency involved, determine whether such officer or employee is entitled to retirement under this subsection. In making such determination, the

> Commission shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such officer or employee.

Thus, Section 1(d) on its face makes perfectly clear that its special retirement provisions can only apply to an otherwise eligible employee where the head of the agency so recommends; in the absence of such a recommendation, the employee has no right whatever to the benefits of the Section.

a. The reason for this requirement becomes immediately apparent upon examination of the history and purpose of Section 1(d). This Section is part of the Civil Service Retirement Act of 1930, 5 U.S.C. 691 *et seq.,* dealing generally with retirement of civil service employees. As originally enacted the Retirement Act sought, *inter alia,* to provide for the voluntary retirement of employees of a certain age who had served a minimum number of years (5 U.S.C. 691) and the compulsory retirement of persons who, by reason of age, were no longer able to render satisfactory service (5 U.S.C. 715). The latter provision required the retirement on an annuity of any employee who had completed fifteen years of service and had reached his seventieth birthday. In 1947, Congress amended the Retirement Act to provide for the *voluntary* retirement "on his own application and with the consent of the Attorney General * * *" of any special agent or other investigation employee of the Federal Bureau of Investigation who was at least fifty years of age and had rendered twenty years or more of service in such capacity. Public Law 168, 61 Stat. 307, 80th

Cong., 1st Sess.[1] The object of this amendment was to allow, *with the consent of the Attorney General,* men in that service to retire earlier in order that younger men might be induced to enter it. See U.S.C. Congressional Service, 80th Cong., 1st Sess., 1947, p. 1277. A more liberal method of computing the annuity in such instances was provided in order to prevent an economic hardship on the employee and to provide an incentive for the employee to accept earlier retirement. Thus the Attorney General was able, when he felt the bureau needed younger men to perform its duties more effectively, to offer to its older employees the opportunity to retire under the provisions of this Act. The statute, however, created no *right* in the agents to such retirement; by its terms the Attorney General was not obligated to retire F.B.I. employees merely because they met the age and length of service requirement, but was expressly given the authority to allow their retirement in his discretion.

In 1948, Congress extended these special retirement provisions to other Government agencies employing personnel engaged primarily in law enforcement. The

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[1] Public Law 168 provided:

> Section 1(b) of the Civil Service Retirement Act of May 29, 1930, as amended, is amended by adding at the end thereof the following new subsection:
>
> (i) Any special agent, special agent in charge, inspector, Assistant Director, assistant to the Director, Associate Director, or the Director, who is at least fifty years of age and who has rendered twenty years of service or more as a special agent, or as aforesaid above, in the Federal Bureau of Investigation may, on his own application and *with the consent of the Attorney General,* retire from the service and such annuity of such employee shall be equal to 2 per centum of his average basic salary for the five years next preceding the date of his retirement, multiplied by the number of years of service, not exceeding thirty years. [Emphasis supplied.]

1948 amendment, which introduced the change upon which appellee here bases his claim, likewise restricted its benefits to those employees who secured "the recommendation of the head of the department or agency" in which they were serving. 5 U.S.C. 691(d), *supra*, p. 5. The legislative history of this amendment, as well as its language, establishes that, as in the original provision, this privilege of early retirement was not given as an absolute right to the employee, but was wholly dependent upon the decision of his agency head, who presumably would consider such factors as the agency's need for younger men in its more hazardous positions.[2] In short, the purpose of the Act, as demonstrated throughout its history, is not primarily to confer any benefit upon employees within its coverage, but rather to enable the Government agencies involved, by selective use of these special benefits, to maintain a force of relatively younger men more capable of performing the hazardous duties to which the Act refers. Unlike other retirement provisions, which are primarily intended for the benefit of the employees themselves, retirement under Section 1(d) remains, in

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[2] See U.S. Code Congressional Service, 80th Cong., 2d Sess., 1948, p. 2275. Moreover, this legislative history strongly indicates that Internal Revenue Agents were not contemplated as coming within the meaning of the provision. Thus, while some of the suggested drafts of bills to amend Public Law 168 followed the form of that law and specified which employees could be retired under this special provision, none of them specified Internal Revenue Agents. See, *e.g.*, the employees listed in the draft on p. 2281 of U.S. Code Congressional Service, 1948, *supra*. The bill as it was finally enacted, Public Law 879, 62 Stat. 1221, July 2, 1948, deleted all reference to which employees could be retired under the Act and entrusted to the Civil Service Commission the determination whether employees, who had been recommended for such retirement by their agency heads, in fact had performed duties which fall within the purview of the statute.

the first instance, a matter for the agency head himself, as an important administrative tool in maintaining the efficiency of the service; and the employee himself therefore has no vested right to these benefits. As the Civil Service Commission points out in its Federal Personnel Manual:

> The legislative history of this provision shows that its purpose is to allow the earlier retirement of certain employees whose duties are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States who, because of the physical requirements of their positions and the hazardous activities involved, are no longer capable of carrying on efficiently. Their replacement by younger men would improve the service. A more generous method of computing the amount of annuity is provided, not as a special reward for the type of service involved, but rather because a more liberal formula is usually necessary to make the earlier retirement (with resultant shorter service) economically possible.
>
> The agency head's recommendation for retirement under this provision is discretionary, and the law does not require him to recommend retirement merely because the employee meets the age and service requirements. He should exercise his discretion to recommend favorably only when he determines that the public interest would be best served by the employee's retirement with annuity computed under the generous formula applicable. * * *[3]

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[3] Civil Service Commission Federal Personnel Manual R-5-36. Since the Civil Service Commission is charged with the re-

b. The foregoing discussion of the history and purpose of Section 1(d), as well as the language of the statute itself, makes clear that no matter how well qualified with respect to the other statutory requirements an employee may be, he nevertheless cannot be approved by the Civil Service Commission for retirement under this provision unless he has also received the recommendation of his agency head. Thus the statutory language not only requires both the recommendation of the employing agency and the approval of the Civil Service Commission as independent and equally necessary prerequisites to Section 1(d) retirement [4] but leaves no doubt as to the difference between the functions of the two agencies in effecting an employee's retirement under the Section. On the one hand, the statute sets no objective standard to govern the granting or withholding of the employing agency's recommendation; and in light of our discussion of the purpose of the Act, *supra,* pp. 10-12, it is perfectly clear that this was deliberately done to permit the agency head himself to make this determination on the basis of his own assessment of the public

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sponsibility for the administration of the Federal Retirement Program, including the issuance of regulations and instructions thereunder (5 U.S.C. 709), the agency's interpretation of the statute should, of course, be accorded great weight. *United States* v. *Citizens Loan & Trust Co.*, 316 U.S. 209, 214; *United States* v. *Madigan,* 300 U.S. 500, 505. This rule has special applicability where, as here, "* * * it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315.

[4] The first sentence of the statute provides that an otherwise eligible employee may retire under the Section "upon the recommendation of the head of the department or agency in which he is serving, and with the approval of the Civil Service Commission * * *."

interest and the needs of the service, rather than simply in terms of the individual employee's qualifications. Only if the agency head determines to recommend him for 1(d) retirement does the employee then acquire the right to have his personal qualifications for these benefits evaluated by the Civil Service Commission. The statute makes this plain, by expressly providing in its second sentence that the Commission "shall, *upon recommendation by the head of the department or agency involved,* determine whether such officer or employee is entitled to retirement under this subsection" [emphasis supplied]. In determining this entitlement, the Civil Service Commission must, of course, apply the objective statutory criteria with respect to age, length of service, and appropriately hazardous duty, including the admonition in the final sentence of Section 1(d) to "give full consideration to the degree of hazard" to which the individual employee is subjected. But an employee is not entitled to have the Commission even consider these qualifications, let alone approve his retirement under Section 1(d), unless the head of the employing agency has *first* recommended him for these benefits.[5]

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[5] Although the Act was amended in 1956 to require the agency head as well as the Civil Service Commission to consider the degree of hazard to which the individual employee was subjected, we show (*infra*, pp. 21-23), (1) that this new legislation does not apply to the appellee; (2) that it in fact accentuates the extent of the discretion which Section 1(d) vested in the agency head; and (3) that even if this new language did apply to appellee, it would still not require his agency head to recommend him merely because he was engaged in performing hazardous duties. Both the old and the new statutes, as we show, leave the agency head with full discretion to withhold his recommendation if, in his view, the needs of the service or other such factors so indicate.

2. *Since the appellee was not recommended by the Secretary of the Treasury for retirement under Section 1(d), the district court should have dismissed his claim for the benefits of that Section.* As we have shown, *supra,* pp. 8-14, the recommendation of the head of the employee's agency is a statutory requisite for retirement under Section 1(d) of the Retirement Act. Since the Secretary of the Treasury, as head of the agency where appellee was employed, refused to recommend him for such benefits, the district court plainly should have dismissed his complaint for failure to state a claim upon which relief could be granted. For, although a district court in a suit under the Tucker Act has jurisdiction over a claim for an annuity, *Dismuke* v. *United States,* 297 U.S. 167, the Supreme Court has made clear that the court can only grant relief where the administrative denial of the benefit turned upon a pure question of law. "[T]he power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled." *Id.* at 172. A different rule applies, however, in cases where the authority to decide whether the claimant shall receive the benefit is by statute conferred upon an administrative officer. "If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his." *Ibid.*

a. This principle of the *Dismuke* case is not, of course, novel doctrine; for more than a century, the Supreme Court has consistently recognized that administrative discretion in such matters is not for

judicial review.[6] Thus, in *United States* v. *Geo. S. Bush & Co., Inc.,* 310 U.S. 371, 380, Mr. Justice Douglas pointed out:

> * * * It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review.* * *

The latest in the long line of cases upholding this doctrine, *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, again makes clear that while judicial relief is often available in "situations where ministerial duties of a nondiscretionary nature are involved", the courts cannot intervene where "the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." 356 U.S. at 318.

This, of course, is such a case. As we have shown in Point A-1, *supra,* pp. 8-14, the authority to recommend an employee for retirement under Section 1(d) is by statute vested completely in the discretion of the head of the employing agency. The district court has no jurisdiction to substitute its discretion for that of the agency head, nor, since the statute laid down no standards to govern the exercise of this discretion, could the court inquire into the reason why the recommendation

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[6] See, *e.g., Martin* v. *Mott,* 12 Wheat. 19, 31, where Justice Story stated:

> * * * Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. * * *

had been denied.[7] Since this recommendation was a *sine qua non* to retirement under Section 1(d), its absence completely precluded the district court from awarding appellee the benefits of this Section. Just as if appellee had failed to meet one of the other statutory requisites, such as age or length of service, so, too, his failure to obtain the recommendation of the Secretary of the Treasury required the district court to dismiss his suit for failure to state a claim upon which relief could be granted.[8]

b. Precisely this result was reached in the only other case to consider this question, *Gibney* v. *United States,* 146 F. Supp. 135 (S.D. Calif.). The facts in the *Gibney* case were on all fours with those here; Gibney, like Cummins, was an Internal Revenue Agent attached to the Fraud Unit, and when the Secretary of the Treasury refused to recommend him for retirement under Section 1(d), he brought suit for the benefits of that Section. Chief Judge Yankwich, in an extensive and carefully reasoned opinion, sustained the Government's defense that the complaint had failed to state a claim upon which relief could be granted. After analyzing the language and the legislative history of Section 1(d),

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[7] Even if the administrative discretion had been abused, appellee could only challenge its exercise in a mandamus action brought in the District of Columbia. See *infra,* pp. 24-28.

[8] Cf. *Palmer* v. *United States,* 129 C. Cls. 322, 121 F. Supp. 643, where a Tucker Act suit for benefits under Section 1(d) of the Retirement Act was predicated upon the allegation that the plaintiff had been improperly transferred from a position within the coverage of the Act after only fifteen years, thus preventing him from obtaining the necessary twenty years of service. The Court of Claims pointed out that any action based upon the allegedly improper transfer was barred by limitations, and held that since plaintiff could not show he had held a covered position for twenty years, his suit must be dismissed for failure to state a claim upon which relief could be granted.

Judge Yankwich found that Congress had made both the recommendation of the head of the employing agency and the approval of the Civil Service Commission "conditions precedent to the granting of voluntary retirement under these more favorable conditions. (146 F. Supp. at 139.) He pointed out (*id.* at 140) that Congress had not "laid down any rules under which the recommendation of the head of the agency shall be granted," and, accordingly, that, under the ruling in *Dismuke* v. *United States, supra,* the court had no power to question the exercise of administrative discretion in refusing such recommendation.[9] We submit that Judge Yankwich was clearly correct and that this action, too, should have been dismissed for failure to state a claim upon which relief could be granted.

B. *The District Court Erred in Awarding Appellee Section 1(d) Benefits on the Ground That He Was Denied Them Because of an Erroneous Interpretation of the Statute.*

As we have shown in our first point, *supra,* pp. 8-18, the failure of the appellee to secure the recommendation of the Secretary of the Treasury for his retirement under Section 1(d) required that his suit be dismissed

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[9] The court also stated, by way of dictum, that since Gibney had not shown that he had performed appropriately hazardous duties, the court could not question the administrative determination "even if the Secretary of the Treasury and the head of the Civil Service Commission, both of whom have their official residence in the District of Columbia, were parties to this action * * *" (146 F. Supp. at 141). We consider the question of jurisdiction over these officials, as well as Judge Yankwich's discussion in the latter part of his opinion (146 F. Supp. at 141-142) as to the validity of the refusal to permit retirement under Section 1(d) of Internal Revenue Agents attached to the Fraud Unit, in our Point B-2, *infra,* pp. 24-28.

for failure to state a claim upon which relief could be granted. Such a recommendation is a condition precedent to entitlement to these benefits, and by statute is to be granted solely in the discretion of the agency head. Since, as we have shown, the district court was without power to interfere in this exercise of administrative discretion, the lack of the required recommendation was fatal to appellee's claim.

Nevertheless, the court below held that appellee was entitled to relief because the refusal of the Secretary of the Treasury to recommend his retirement under Section 1(d), and of the Civil Service Commission to approve such retirement, was based upon an erroneous interpretation of the statute. We submit that the district court was clearly wrong in awarding judgment to the appellee on this basis. As we shall show, *infra,* pp. 19-24, there was in fact no violation of any of the statutory requirements by either the Secretary of the Treasury or the Civil Service Commission. But even if there were a violation of the statutory mandate, we show further, *infra,* pp. 24-28, that in the circumstances here such a violation could be challenged only by a mandamus action in the District Court for the District of Columbia, the only court which could acquire personal jurisdiction over either the Secretary of the Treasury or the members of the Civil Service Commission in their official capacities.

1. *Neither the Secretary of the Treasury nor the Civil Service Commission misinterpreted the statute in denying appellee's retirement under Section 1(d).* The court below based its judgment for appellee on the ground that he had been denied Section 1(d) retirement because of an erroneous interpretation of the statute. The court found that the Secretary of the

Treasury and the Civil Service Commission had refused to grant appellee the benefits of Section 1(d) because he was not employed in a position which the two agencies had approved for entitlement to the provisions of that Section, and held that the determination on this basis violated the statutory mandate to consider the degree of hazard to which the individual employee was subjected in the performance of his duties rather than the general duties of the class of the position which he held. We submit that there is no basis for this conclusion, and that neither of the agencies failed to comply with the requirements of the statute.

a. In the first place, it is obvious that since the appellee had never been recommended for Section 1(d) retirement by the head of his agency, the question of the degree of hazard to which he was subjected in the performance of his duties never even became relevant. The statutory admonition that the degree of hazard be determined on an individual basis does not apply to the head of the employing agency in granting or withholding a recommendation for Section 1(d) retirement; to the contrary, we have shown that Congress has endowed the agency head himself with full discretion to make the initial selection of employees who would be considered for this special retirement. The requirement that individual hazard be considered expressly applies only to the *Civil Service Commission,* in determining the eligibility of an employee who has already received such a recommendation. Section 1(d) provides that once an employee has been recommended for special retirement by the head of his agency, the Commission shall then determine his entitlement thereto; and the statute continues: "In making such determination, *the Commission* shall give full consideration to the degree

of hazard to which such officer or employee is subjected in the performance of his duties * * *." [Emphasis added.] Manifestly, this requirement has no application to the head of the employing agency, and in no way restricts his discretion in the first instance to grant or withhold his recommendation, in accordance with his own concept of the needs of the service, employee morale, and any other factors which he deems relevant.

b. Subsequent to appellee's retirement, Section 1(d) was amended and renumbered as Section 6(d) by the Civil Service Retirement Act Amendments of 1956, P.L. 854, 70 Stat. 736, 744, 5 U.S.C. (1952 ed., Supplement V) 2256(c). This statute became effective October 1, 1956, and specifically provided in Section 403 that it would not apply in the case of employees retired or otherwise separated prior to its effective date. See 5 U.S.C. 2251, note (1952 ed., Supplement V). Section 6(c) *supra,* pp. 5-6, provides, as does former Section 1(d), that an employee primarily engaged in law enforcement may obtain special retirement benefits if he receives the recommendation of his agency head and the approval of the Civil Service Commission. Unlike former Section 1(d), however, Section 6(c) requires that *both* "[t]he head of the department or agency and the Commission shall give full consideration to the degree of hazard to which such employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by such employee."

Although the appellee is not covered by the new Section 6(c), this subsequent legislation throws additional light upon the validity of the administrative action in refusing to recommend him for Section 1(d) benefits. It is, of course, well settled that "[s]ubsequent legis-

lation may be considered to assist in the interpretation of prior legislation upon the same subject." *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 309; *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, 277; cf. *United States* v. *Hutcheson,* 312 U.S. 219; *Brown* v. *Duchesne,* 19 How. 183, 194. Here, as both the new statute and its legislative history make clear, Congress was for the first time placing a condition upon the exercise of the agency head's previously unfettered discretion to grant or withhold his recommendation for special retirement benefits as he saw fit. The Senate Report on H.R. 7619, the bill which became P.L. 854, expressly stated with respect to the new Section 6(c) (S. Rep. 2642, 84th Cong., 2d Sess., p. 7):

> Section 6(c)
>
> Under existing provisions relating to the retirement of employees whose duties are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the criminal laws of the United States, the Civil Service Commission is required to give full consideration to the degree of hazard to which the employee is subjected in the performance of his duties, rather than the general duties of the class of the position held by the employee. Under the bill the head of a department or agency would likewise be required to give consideration to these factors in recommending retirement of an employee under these provisions.

Thus this legislative history leaves no doubt "that Congress thought that it was changing the law by changing the language of the Act," *United States* v. *Plesha,* 352 U.S. 202, 208, and that under former Sec-

tion 1(d) the head of the agency was not required even to consider degree of hazard in determining whom to recommend for special retirement.

Moreover, it should be noted that even under the new Section 6(c), the right of the administrator to withhold his recommendation upon some other ground is in no way circumscribed by the statutory admonition to consider the individual degree of hazard to which an applicant was subjected. Thus, an administrator can still determine—and doubtless often does—that even though an individual employee was subjected to considerable hazard, nevertheless the needs of the service or another of the factors which we discussed above (*supra,* pp. 10-12, 14), warrant his withholding his recommendation for this special retirement. Nor is there any reason why he should not determine, on the basis of such factors, to refuse to recommend all the occupants of a given position for special retirement. The statute certainly does not prohibit this, and it is easily conceivable that the needs of the Service might dictate retaining, for example, all Internal Revenue Agents in the fraud group as long as possible.

c. Finally, there is no substance to the court's finding that the Civil Service Commission violated the statutory terms by failing to consider the degree of hazard to which appellee as an individual was subjected. As we have shown, the Civil Service Commission is required to consider the factor of degree of hazard, like those of age and length of service, only where an employee has been recommended for Section 1(d) retirement by his agency head; in the absence of such recommendation, the Civil Service Commission has no authority even to consider whether an employee has satisfied any of these statutory criteria, much less to ap-

prove his retirement under Section 1(d). See *supra,* pp. 13-14. Since the appellee here never received such a recommendation, the Commission was required to refuse his application without reaching any of these other matters. And, as the record makes clear, the Commission did precisely this; its letter to appellee (R. 136-137) unequivocally advised him that his application was being rejected because of his failure to satisfy a condition precedent to such retirement, the recommendation of his agency head. Thus, the Commission never had occasion even to consider the degree of hazard to which appellee had been subjected, and obviously did not deny appellee's application on the basis of such a consideration.[10]

2. *If appellee was denied Section 1(d) benefits because of a misinterpretation of the statute, he must in the circumstances of this case seek relief solely through a mandamus action brought in the District of Columbia.* Even if, contrary to the foregoing discussion, the dis-

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[10] Even if the appellee had been recommended by the Secretary of the Treasury for Section 1(d) retirement, the Commission could properly have refused to approve his retirement on the basis of the position he held, without violating the statutory admonition to consider the degree of hazard to which the individual employee was subjected. For the legislative history of this provision indicates that it is intended only as a *limitation* upon entitlement to Section 1(d) benefits, and operates to prevent blanket inclusion within the Act of all occupants of any position. See H. Rep. 2034, 80th Cong., 2d Sess., reprinted in U.S. Code Congressional Service, 1948, p. 2275, at 2276. As Judge Yankwich pointed out in the *Gibney* opinion, 146 F. Supp. at 139-140, it would not be arbitrary to classify Internal Revenue Agents attached to the Fraud Unit as not being primarily engaged in enforcement of the criminal law within the meaning of the Act. What the Commission could not do under the language of Section 1(d) would be to *approve* all of the occupants of a position, without considering the degree of hazard to which they were individually subjected; and that question, of course, is not involved here.

trict judge was justified in finding that appellee was denied special retirement benefits because of an erroneous application of Section 1(d), it is clear that the court below was without jurisdiction to award him these benefits. As we have shown, *supra,* pp. 8-18, the failure of appellee to obtain the recommendation of the Secretary of the Treasury was, as a matter of law, fatal to his Tucker Act suit. Accordingly, while he may have a legal remedy if this recommendation was improperly withheld, such a remedy must be pursued by seeking a writ of mandamus in the District Court for the District of Columbia.

a. Even upon appellee's own theory of this case, as adopted by the court below, his suit must be, not for a money judgment for Section 1(d) retirement benefits (for he has never satisfied the statutory requirement of a recommendation for such benefits), but rather an order to compel the Secretary of the Treasury to exercise his discretion in accordance with law. Similarly, any relief to which appellee might be entitled against the Civil Service Commission must likewise be obtained through a personal suit against the Commissioners, themselves, in their official capacity, to compel them to abandon the practice of negotiating with the various agencies' lists of positions to be covered by or excluded from Section 1(d). This is plainly the only manner in which appellee could attack the alleged abuse of administrative discretion which he claims has deprived him of his right to Section 1(d) retirement. Such an action, however, is in the nature of a writ of mandamus, and must therefore be brought in the District of Columbia Circuit, the only court authorized to compel official action through mandatory proceedings. Among the long line of cases so holding, in reliance on

Sections 11 and 14 of the Judiciary Act of 1789 (1 Stat. 78, 81-82, now 28 U.S.C. 1332, 1345, 1651), see, *e.g.*, *McIntire* v. *Wood,* 7 Cranch 503, 504; *McClung* v. *Silliman,* 6 Wheat. 598; *Bath County* v. *Amy,* 13 Wall. 244, 248; *Rosenbaum* v. *Bauer,* 120 U.S. 450; *Knapp* v. *Lake Shore & Michigan Southern Ry. Co.,* 197 U.S. 536; *Covington & Cincinnati Bridge Co.* v. *Hager,* 203 U.S. 109; *Stevenson* v. *Holstein-Friesian Ass'n.,* 30 F. 2d 625, 626 (C.A. 2); *Truth Seeker Co.* v. *Durning,* 147 F. 2d 54, 56 (C.A. 2); *Amchanitzky* v. *Sinnot,* 69 F. 2d 97 (C.A. 2).[11]

Moreover, since the very administrative officials against whom appellee must seek relief—the Secretary of the Treasury and the members of the Civil Service Commission—are officially domiciled in the District of Columbia, only that District Court can obtain the necessary jurisdiction over them in their official capacities. *Blackmar* v. *Guerre,* 342 U.S. 512. Thus, whatever the nature of the relief sought by appellee, the fact that, as we have shown, it must be pursued against these officials *eo nomine* requires that his action be brought in the District of Columbia.

b. Even in an action brought in the District Court for the District of Columbia, however, it is plain that appellee would not be able to compel the Secretary of the Treasury to recommend his retirement under Section 1(d). As we have shown (*supra,* pp. 8-14), such a rec-

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[11] This principle has not been altered by the promulgation of Rule 81(b), F.R.C.P., nor by the codification of Title 28 in 1948. See, *e.g.*, *Petrowski* v. *Nutt,* 161 F. 2d 938, 939 (C.A. 9), certiorari denied, 333 U.S. 842; *Marshall* v. *Crotty,* 185 F. 2d 622 (C.A. 1). Nor does the Administrative Procedure Act give the court below jurisdiction to grant such relief; *Blackmar* v. *Guerre,* 342 U.S. 512, 515-516; *Adcox Schools* v. *Administrator of Veterans Affairs,* 217 F. 2d 54 (C.A. 9).

ommendation is by law committed to the discretion of the agency head. Mandamus, of course, lies only to compel a ministerial act, *United States ex rel. Dunlap* v. *Black,* 128 U.S. 40, 48; *Wilbur* v. *United States,* 281 U.S. 206, 218; *Interstate Commerce Commission* v. *United States ex rel. Campbell,* 289 U.S. 385, 393-394, and cannot control the exercise of discretion. Accordingly, even a court with necessary jurisdiction could, at most, have required the Secretary to exercise his discretion in accordance with law—*i.e.,* by not denying his recommendation to appellee solely on the basis of an erroneous interpretation of the statute—but could not have assumed to control or guide the exercise of this discretion by requiring the Secretary to grant such recommendation. See *e.g., Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 144-145; *Virginia Ry. Co.* v. *System Federation No.* 40, 300 U.S. 515, 551; *Interstate Commerce Commission* v. *Humboldt S.S. Co.,* 224 U.S. 474, 485.[12]

In any event, it is clear that the court below had no jurisdiction either to award appellee benefits which by statute are within the discretion of his agency head, or to interfere with the exercise of this discretion. Even if, as appellee contends, he had been denied these benefits because of an erroneous interpretation of the statute, his remedy lies against the administrative officials

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[12] Similarly, even under the new Section 6(c), which replaced former Section 1(d) (see *supra,* pp. 21-23), no court could *order* the Secretary to recommend appellee for special retirement. For although the new statute requires the Secretary, in determining whether to grant his recommendation, to consider the degree of hazard to which the employee was exposed, it clearly does not limit his discretion to deny his recommendation for any other reason to any employee, whether or not he had performed hazardous duties.

themselves, in an action in the District of Columbia, their official domicile. He has sued the wrong defendants in the wrong court, and his action must be dismissed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed.

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APPENDIX

TABLE REQUIRED BY SUBDIVISION 2 (F) OF RULE 18 OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

	Identified	Offered	Received in Evidence
Plaintiff's Exhibit 1....	38	38	38
Plaintiff's Exhibit 2....	38	38	38
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Page references are to the printed record, indicating points at which exhibits were identified, offered and received in evidence.

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